90-1816

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

ROBERT M. SPIRE, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Article XII section 8 of the Nebraska Constitution deprives the Plaintiff of the Equal Protection of the Law as guaranteed by the Fourteenth Amendment of the United States Constitution?

II. Whether Article XII section 8 of the Nebraska Constitution contravenes the Due Process and Taking clauses of the Fourteenth Amendment to the United States Constitution in so far as it provides for escheat of property without payment to the owner?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

MSM Farms, Inc., Petitioner and Plaintiff below.

The Respondents and defendants below are:

Robert M. Spire, Attorney General
for the State of Nebraska

The Intervenors and defendants below are:

Everett Holstein
Richard Bartek

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OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 927 F.2d 330 (Feb. 27, 1991). The opinion of the district court (App. 12) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 27th 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article XII section 8 of the Nebraska Constitution provides in relevant part that:

That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.

Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.

Syndicate shall mean any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships.

These restrictions shall not apply to:

(A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at lease one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree

of kindred to the majority of stockholders in the family farm corporation.

These restrictions shall not apply to:

(B) Non-profit corporations.

These restrictions shall not apply to:

(C) Nebraska Indian tribal corporations.

These restrictions shall not apply to:

(D) Agricultural land, which, as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For the purposes of this exemption, land purchased on a contract signed as of the effective date of this amendment, shall be considered as owned on the effective date of this amendment.

These restrictions shall not apply to:

(E) A farm or ranch operated for research or experimental purposes, if any commercial sales from such farm or ranch are only incidental to the research or experimental objectives of the corporation or syndicate.

These restrictions shall not apply to:

(F) Agricultural land operated by a corporation for the purpose of raising poultry.

These restrictions shall not apply to:

(G) Land leased by alfalfa processors for the production of alfalfa.

These restrictions shall not apply to:

(H) Agricultural land operated for the purpose of growing seed, nursery plants, or sod.

These restrictions shall not apply to:

(I) Mineral rights on agricultural land.

These restrictions shall not apply to:

(J) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential use for nonfarming or nonranching purposes. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm of nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, not to exceed a period of five years, such land may not be used for farming or ranching except under lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(K) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of

a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(L) A bona fide encumbrance taken for purposes of security.

These restrictions shall not apply to:

(M) Custom spraying, fertilizing, or harvesting.

These restrictions shall not apply to:

(N) Livestock futures contracts, livestock purchased for slaughter, or livestock purchased and resold within two weeks.

If a family farm corporation, which has qualified under all the requirements of a family farm or ranch corporation, ceases to meet the defined criteria, it shall have fifty years, if the ownership of the majority of the stock of such corporation continues to be held by person related to one another within the fourth degree of kindred or their spouses, and their landholdings are not increased, to either requalify as a family farm corporation or dissolve and return to personal ownership.

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General or any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall

commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment. Nebraska citizens and entities shall have standing in district court to seek enforcement.

The Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section. (Adopted, 1982 by Initiative Petition #300.)

STATEMENT OF THE CASE

This is an action for declaratory judgment commenced by the Plaintiff corporation against the Attorney General of Nebraska. The jurisdiction of the District Court for the District of Nebraska was based upon 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory judgment) and the Fourteenth Amendment to the Constitution of the United States.

The petition sought a declaration that Article XII section 8 of the Nebraska Constitution which was adopted by the initiative of the voters is unconstitutional as being in violation of the Fourteenth Amendment to the

United States Constitution, and a temporary and permanent injunction against enforcement.

The Attorney General first asserted that no case or controversy existed in that the plaintiff was a sham and without real substance and moved for summary judgment. That motion was denied.

Two individuals sought and were granted leave to intervene. The case was submitted to the Court on the pleadings, stipulated facts, and certain affidavits and documentary evidence.

The District Court filed its opinion on January 19th, 1990 holding that Article XII section 8 of the Nebraska Constitution was valid and enforceable and entered judgment for the defendant.

The plaintiff filed Notice of Appeal on February 16th, 1990 within the time provided by 28 U.S.C. § 2107 to the Eighth Circuit Court of Appeals.

The Eighth Circuit filed its opinion of February 27, 1991 holding that the district court properly applied the test in evaluating the constitutionality of Article XII section 8 of the Nebraska Constitution, and affirmed the district court judgment.

The plaintiff filed this Writ of Certiorari within the time provided for by 28 U.S.C. § 2101 (c).

REASONS FOR GRANTING PETITION

> The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity

> in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.[1]

This case, without any exaggeration intended, will quite literally decide the future of agriculture in America with respect to who may or may not be a farmer and who may or may not engage in farming in these United States. For that reason, the Attorney Generals of key agricultural states have entered the case.

This court's decision on whether to grant Certiorari in this case will in fact determine who will and who will not be allowed to engage in a business that has traditionally been open to every man, woman and child in America without restriction – namely, AGRICULTURE.

The court of appeals held that Article XII section 8 served a legitimate state interest and the means used to serve that interest was rationally related. As a result citizens of the same state as well as citizens of the several states of this country are treated unequally under the laws of the state of Nebraska.

Because the Court of Appeals seriously misconstrued this Court's prior decisions on the issue of legitimate state interest and rational relationship, and because the

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[1] *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884); (Field, J., concurring) (quoting *Smith's Wealth of Nations*, Bk. I. Chap. 10.)

Appeals Court's error will have such far reaching effects on agriculture across the length and breadth of these United States, a review of the decision is essential.

A. THE COURT OF APPEALS ERRONEOUSLY FOUND THAT ARTICLE XII SECTION 8 OF THE NEBRASKA CONSTITUTION SERVES A LEGITIMATE STATE INTEREST.

Article XII section 8 of the Nebraska Constitution not only creates a classification of U.S. persons who are incapable of owning a certain class of real property within the boundaries of the State of Nebraska it proceeds even further and also forbids them from even engaging in the purely physical or mental acts of "farming or ranching". Thus, this initiative and its restrictive effects go far, far beyond the mere purchase and ownership of agricultural land and into the very acts individuals are allowed to do with respect to "farming and ranching".

The single most important factor to remember about Article XII section 8 is precisely that which the lower courts missed. Article XII section 8 is a restriction on all individuals, not corporations. It restricts the tools individuals may use to engage in the acts of farming or of owning farmland.

The corporate structure is a reasonable and necessary tool for individuals to use in order to join together in order to engage in business in the 20th and 21st centuries. Agriculture is a business and Article XII section 8 says this necessary tool can only be used if you use it in conjunction with relatives. That is somewhat like the now fallen Berlin wall. During its 40 years of existence only 81

individuals were killed trying to get over or around the wall. But, during that same 40 years, another twenty million people were kept in check and in line because of the wall's very existence. Twenty million who did not attempt to escape or go over the wall because of the threat the wall posed.

The skillful lawyer may well find loopholes to get around Article XII section 8 for a few who dare to attempt it. True enforcement itself is an impossible goal, but the millions who will never attempt to engage in farming or owning farm land because of the very existence of Article XII section 8 is frightening for the future agricultural economy of America. Article XII section 8 simply says to all who would enter farming, "Unless you are kinfolk, don't team up with any other individual(s) to try and get involved in agriculture".

It is hard to conceive of a greater denial of equal protection on completely specious grounds than Article XII section 8 imposes on all individuals contemplating entering agriculture. One might just as well say, "Only redheads or people over six feet tall or people who happen to be born white are allowed to team up and use the corporate structure to engage in owning land or doing acts associated with farming and ranching".

That classification makes it illegal for a corporation to own farm or ranch land in the State of Nebraska unless certain criteria are met, one of which is a requirement of family relationship. The question presented is not confined to just what a state can do to a corporation, but to what extent a state can impair a U.S. citizen's right to transact business within the boundaries of the United

States. The cost of doing business in the farm and ranch sector is enormous. Article XII section 8 does not just restrict the manner of ownership. It effectively causes exactly what it is claimed to prevent. Article XII section 8 doesn't prevent the demise of the "typical" family farm. Considering the cost of ownership of farm and ranch land, Article XII section 8 creates a system in which only select and privileged families are allowed the protection of certain Nebraska laws. As Justice Bradley observed in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884) — "If it is not a denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition." *Id.* at 766.

The protection of corporate law in relation to the occupation of farming and ranching in the State of Nebraska has been limited to only those individuals which maintain the majority of the corporate voting stock within the immediate family and further requires the physical presence of a family member either on the property or involved in the day to day labor. While licenses are properly required when persons pursue certain professions and avocations which require peculiar skills or supervision for the public health and welfare, such is not the case here. "The profession or avocation is open to all alike who will prepare themselves with the requisite qualifications or give the requisite security for preserving public order:" *Id.* at 763. The pursuit of an occupation of farming or ranching does not entail such requisite training. If that were the case, we would demand that all

farmers have advanced degrees in agronomy, chemistry and environmental protection.

The facts of this case clearly show the inequality and denial of the equal protection of the laws. The appellants in the case at bar only own about 10 acres and are not what one could classify as a huge corporation out to monopolize the agricultural community. Yet under the existing law, one particular family can own hundreds of thousands of acres, and its members can freely engage in the act of farming and ranching, even if the family corporation is a large national food production chain. For example: Tyson Foods and Cargill with their MULTI-BILLION dollar operations are legal, family owned corporations under Article XII section 8, but the two petitioners in the case at bar who joined together to own ten acres are illegal because they are not family related. Ridiculous. Absurd. Unconstitutional? The answer is clearly that this type of treatment is unconstitutional.

Article XII section 8 does not prevent the creation of enormous farms and ranches under the control of a select few. In fact it does just the opposite to a much greater degree. The select few allowed to be involved in agriculture are even fewer because of the necessary family ties.

Due to the economies of scale there is a point at which small family farms and medium family farmers are incapable of sustaining their livelihood and at the same time prevents them from participating in what has become one of the major financing means available to all industry. That financing is the creation of a corporation in order to sell off pieces of the corporation in the form of stock so that the capital can be raised to create and/or

operate a business. To restrict a corporation in the manner which Article XII section 8 does is clearly violative of the rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The Article XII section 8 Constitutional restrictions on corporations are really restrictions upon all individuals. This is the subtle nuance that obviously the lower courts have missed. Thus, two individuals who want to avail themselves of the corporate laws of the State of Nebraska (or any other state) to join together and engage in farming or ranching are prohibited from doing so while two other individuals who have the proper family relationship are allowed to utilize the corporate laws of the state.

It is individuals, every single individual in Nebraska or the United States for that matter, who are most impacted by Article XII section 8. Why? Because the individuals are only allowed to use corporate laws if those individuals have the proper accident of birth and are properly related to each other. How much more clearly can an Equal Protection violation be demonstrated? An accident of birth is to determine who can join together and engage in farmland ownership and engage in acts, mental and physical, associated with farming and ranching.

There simply is no rational basis that can be formulated to show that Tom Jones and Harry Smith, two farmers who are not related, are denied the right to use the corporate structure to engage in agriculture while allowing Tom Jones and his first cousin Harry Smith to use the same corporate structure merely because of an

accident of birth. To state that the reason is to maintain the family farm is to ignore the facts that through the years the typical farm has grown from the initial 160 acres to huge farms and ranches that utilize thousands and thousands of acres. There has been no showing that a corporation such as the one in the case at bar is more of a threat to the farming and ranching industry than the family corporation that owns thousands of acres. There is no rational basis to assume that the family member on the family farm or ranch is going to be more environmentally conscious than the manager who is hired to make sure that the corporation makes a profit. Each is extremely concerned with maintaining a livelihood and a profit margin.

This panacea of outlawing unrelated individuals from using the corporate structure is spreading throughout the agricultural states. Nebraska, however, is the most restrictive model in the United States and is the only state to put such restrictions directly into its Constitution.

The following states, Iowa, Kansas, Minnesota, Missouri and South Dakota, have enacted similar restriction on the ownership of land.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L.Ed. 2d 186, 104 S.Ct. 2321 (1984) held that the prevention of the collection of a majority of real property in the hands of a select few was a legitimate state purpose. However, *Midkiff* has no relationship or bearing on the case at bar. Why? *Midkiff* dealt specifically with the need to involve the government authority in the process of redistributing land for the public welfare of the people and to prevent the concentration of land in the hands of a

select few. The case at bar is, if anything, exactly the opposite. The case at bar seeks to outlaw restrictive laws which concentrate the land in the hands of a few.

The case at bar does not prevent or redistribute land held in the hands of a select few. On the contrary this type of legislation is specifically designed to cause what *Midkiff* held to be against the public interest. Any rationally thinking person realizes that when you prohibit one group of individuals from participating in an occupation you automatically have reduced the number of potential purchasers and participants to a lesser number; thus creating a class of select persons who may participate in the ownership of land. Exactly the result the State of Hawaii was attempting to remedy in *Midkiff*.

Article XII section 8 does not guarantee a wide range of potential farmers and ranchers but rather creates strict limitations on the people who may own the land and engage in the acts of farming and/or ranching. This type of legislation is directly contrary to the Fourteenth Amendment.

A.1 A rational relationship requires more than a belief that the means will work.

Legitimate state interest, rational relationship. This standard of review is anything but clear. It has been thought by many as being nothing more than another way of saying government wins, citizen loses. However, the definition of rational requires at a minimum some logical and unbiased belief that the means used to achieve a certain result is related to some degree. It must require at least that when the problem is looked at in its

entirety that the means stands a better than average chance of accomplishing the task without creating separate privileged classes of people without good cause.

Because the constitutional amendment under consideration today was enacted via an initiative petition under depression like conditions in the farm belt and not by the legislature of the state, there is little legislative history describing the results that were desired. The ballot on which the voting public cast their vote stated that a vote "for will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation". On the face of the ballot itself there is clearly a distinction being made that prevents certain people from obtaining equal protection of the laws of the state of Nebraska as well as the laws of the United States.

The lower courts both looked for a rational basis for the enactment of the amendment and arrived at the statement that "[t]hat voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland." (App.7). Petitioner contends that more is needed than a reasonable belief that the amendment will do what is intended. The mere fact that a reasonable belief existed does not stop one from asking if that reasonableness is tainted by illogic and bias that have no place in the enactment of legislation that affects the ability of people to pursue an occupation of their choice. Imagine such laws being implemented in the food, chemical, grocery, insurance or banking industries. Allowing the use and protection of the corporate laws to only a select few runs contrary to the purposes of our entire thoughts and beliefs as to what equal justice actually is.

B. THE COURT OF APPEALS ERRONEOUSLY REFUSED TO CONSIDER PETITIONERS' DUE PROCESS ARGUMENT.

The court of appeals refused to "pass upon questions which have not been raised and decided by the court below." (App.9). The appeals court reasoned that because the due process argument in the district court was cast differently, it would not consider the argument presented to them.

The argument at the district court level attacked the amendment under the due process clause generally. On appeal the due process argument focused on one particular provision of the amendment that allowed the taking of the property by the state without any procedures for compensation.

The simple fact that the argument was narrower at the appeals level does not prevent the court from deciding the issue. The appeals court in defining its reasons for not considering the argument was that this particular provision had not been applied to MSM. The problem with this reasoning is that it misconstrues the standing of the petitioner. In questions of standing the "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat must be both 'real and immediate,' not 'conjectural or hypothetical' *"City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Applying this criteria to the facts at bar shows that the threat of direct injury is immediate. The instant the amendment is

upheld, the petitioner is required by law to divest themselves of the property or watch the state take the property from them without compensation. There is no problem of immediacy here. The day after this opinion is handed down the owners are threatened with divestiture or escheatment to the state. There is no procedure for compensation and no requirement in the amendment to force the state to sell the property or to use its best efforts to obtain the best price for the property.

B.1 The taking of the property by the state is unconstitutional on its face.

Article XII section 8 provides for the property, if not divested within a limited time frame, to escheat to the state without the payment of any compensation. To allow for real estate to escheat to the State without the showing of a public purpose and the providing of just compensation is in direct conflict with the U.S. Constitution as it applies to the states through the Fourteenth Amendment.

As this court noted in *Rice v. Sioux City Memorial Park Cemetery, Inc., et al,* 725 S.Ct. 614, 349 U.S. 70 (1955) special and important reasons imply a reach to a problem beyond the academic or episodic. The fact pattern involved here is anything but academic or episodic. As shown by the Amici briefs filed in the lower court, this type of legislation has been enacted in more than just one state and its effects reach directly to the entire American agricultural economy. It has long been standard policy in this country that agricultural policy is set by the federal government because of its importance to the nation as a whole and not just the individual states. To allow the

states to affect the long term goals of the federal government's policy by prohibiting certain U.S. citizens from participating in the ownership of farm and ranch land is a policy decision that has no place in the state forum.

Because of the uniqueness and the importance of the questions presented this Court should settle this litigation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 23, 1991

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1300

MSM Farms, Inc., a Nebraska corporation, Appellant, v. Robert M. Spire, Attorney General for the State of Nebraska in his official capacity, Appellee, Everett Holstein and Richard Bartek, Intervenors Below, Appellees.	* * *

In 1982, Nebraska voters adopted article XII section 8 of the Nebraska Constitution through Nebraska's initiative and referendum process. The objective of the initiative was to prohibit non-family farm corporations from owning and operating Nebraska farm and ranch land. In 1988, plaintiff MSM Farms, a Nebraska corporation with unrelated shareholders, sought a declaration that article XII section 8 violates the equal protection and due process clauses of the fourteenth amendment of the United States Constitution. The district court[1] upheld the law. We affirm.

I. EQUAL PROTECTION

The equal protection clause of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A corporation such as MSM Farms is a "person" under the equal protection clause. *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888). MSM argues article XII section 8 of the Nebraska Constitution denies it equal protection because the law's prohibition of non-family corporate farming is not rationally related to achieving any legitimate state purpose.

We begin our analysis with the presumption that the law, which involves no suspect classifications or fundamental rights, is constitutional. *See Kadrmas v. Dickson Public Schools*, 487 U.S. 450, 462 (1988); *New Orleans v.*

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

Dukes, 427 U.S. 297, 303 (1976). Social and economic measures, like the corporate farming prohibition in this case, run afoul of the equal protection clause only when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Kadrmas*, 487 U.S. at 463 (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Dukes, 427 U.S. at 303-04.

In determining whether the people of Nebraska acted in a wholly arbitrary or irrational way in adopting the constitutional provision MSM has challenged, we look first to whether a legitimate state purpose exists for the law voters approved. Because the law was adopted through the initiative and referendum process,[2] there is little traditional legislative history regarding its purpose. *See Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269, 279 (1986). *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465, 467, 468, 470 (1981) (citing legislative debates). Noting that the Nebraska law is similar to the statutory provisions adopted by eight other

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[2] For an explanation of this process, see *Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269, 273-74 (1986).

midwestern states, amici[3] contend Nebraska's objectives are similar to those explicitly set forth in the legislation of these other states.[4] Amici cite as an example Minn. Stat. § 500.24(1), which states that

> it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society . . . and the nuclear family.

Minn. Stat. § 500.24(1). *See also* S.D. Codified Laws Ann. § 47-9A-1.

Defendant-intervenors Everett Holstein and Richard Bartek, Nebraska farmers for over twenty years and supporters of the initiative, contend that the Nebraska law was intended to address the social and economic evils supporters perceived as related to corporate farming. According to evidence presented by defendant-intervenors, supporters of the Nebraska initiative believed that a rise in corporate farming in Nebraska would lead to the decline of the family farmer, who would be unable to compete fairly with the ability of corporations to raise capital and benefit from the tax laws. Supporters further maintained that corporate farming would lead to

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[3] Both the State of North Dakota and the State of Iowa filed amicus curiae briefs in this case.

[4] *See* Iowa Code §§ 172C.1-.15; Kansas Stat. Ann. §§ 17-5902 to 5904; Minn. Stat. § 500.24; Mo. Ann. Stat. §§ 350.010-.030; N.D. Cent. Code §§ 10-06-01 to -15; Oklahoma Stat. tit. 18 §§ 951-56; S.D. Codified Laws Ann. §§ 47-9A-1 to -23; and Wis. Stat. § 182.001.

absentee landowners and tenant operation of farms, would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources. *See generally* Affidavit of George William Burrows, J.A. 267-274; Affidavit of Neil Oxton, J.A. 285-292; Affidavit of Martin Douglas Strange, J.A. 326-328, and attached studies prepared by the Center for Rural Affairs, J.A. 329-438.

Defendant-intervenors presented reports prepared by the Agricultural Extension Services of the North Central Region[5] which reflect this country's historical reliance on family or dispersed farm ownership. *See* University of Illinois at Urbana-Champaign College of Agriculture Cooperative Extension Service, Special Publications 27 & 28, "Who Will Control U.S. Agriculture?" J.A. 196-232. These reports suggest that not only would family farmers find their situation vastly changed if concentrated or corporate farming were to prevail throughout the country, but that firms supplying the farmer/producer, firms marketing and processing farm products, rural communities, and consumers would also be affected. *See, e.g., id.*, Special Publication 27 at 16-17, J.A. 220-221.

In determining the purpose of the Nebraska initiative prohibiting non-family corporate farming, the district court turned to the language of the initiative petition

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[5] The North Central Region includes the Agricultural Extension Services of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin, acting in cooperation with the U.S. Department of Agriculture.

itself. The court concluded that Nebraska voters sought to retain and promote family farm operations in Nebraska and sought to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations. We agree with the district court that such a policy represents a legitimate state interest under the equal protection clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945). *See State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988); *Omaha National Bank*, 389 N.W.2d at 282-83.

MSM nonetheless maintains that Nebraska's prohibition of non-family farm corporations must be struck down because the classifications created by the law are not rationally related to achieving the purpose of preserving the family farm. MSM contends the law is arbitrary because it does nothing to prevent the concentration of ownership of farm lands in corporations owned or controlled by families. MSM further contends the law is irrational because there were only a small percentage of corporate farms in Nebraska at the time voters approved the initiative restricting corporate ownership of farm and ranch land.

MSM misapprehends the nature of our inquiry under the equal protection clause. It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. *See Clover Leaf Creamery*, 449 U.S. at 469. Whether *in fact* the law will meet its objectives is not the question: the

equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land. *Id.* at 466; *Hawaii Housing Authority*, 467 U.S. at 242. *See Kadrmas*, 487 U.S. at 463.

We agree with the district court that voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland. The district court properly observed that MSM's statistics on the percentage of non-family corporate farms in Nebraska shed little light on the question of whether family farming will be benefitted by excluding non-family corporate ownership of farm lands in the future. The reports presented by defendant-intervenors describe a trend toward larger and fewer farms, and state that "[i]f nothing is done now to arrest the forces already in motion, commercial agriculture will likely be increasingly concentrated in larger, more industrialized units." Special Report 28, Leaflet 3, J.A. at 211. Voters could reasonably believe that their initiative would help to curb this trend.

MSM's complaint that the law permits family corporations to continue farming is equally unavailing. As amici effectively point out, the law provides an exception for family-owned and controlled corporations only where a family member resides on the farm or is actively engaged in the day to day labor and management of the farm. Defendant-intervenors contend that MSM as a corporation embodies many of the problems traditional family farmers perceive in corporate farming: neither of its

two incorporators live on or near the tract of farmland MSM purchased in 1988, one had never been to see the land at all, and the other had only limited knowledge of its location and characteristics.

In upholding a state statute which required an applicant for a pharmacy permit to be either a registered pharmacist or a corporation in which the majority of the stock was owned by registered pharmacists, the Supreme Court observed:

> A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. . . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166-67 (1973) (quoting *Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) (Holmes, J., dissenting).

We have little difficulty concluding, based on all of the above, that MSM has failed to carry its "heavy burden" of showing that Nebraska's prohibition on non-family corporate farm ownership is arbitrary and irrational. *See Kadrmas*, 487 U.S. at 463.

II. DUE PROCESS

The district court rejected MSM's due process clause challenge for the same reasons it found MSM's equal protection claim lacking. *See Clover Leaf Creamery*, 449 U.S. at 470 n.12. MSM now casts its due process argument differently, contending on appeal that article XII section 8 offends the due process clause because it contains a provision requiring corporation owners of farm and ranch land to divest themselves of such land within two years after the state has obtained a court order requiring divestment.[6]

We generally do not pass upon questions which have not been raised and decided by the court below, *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976), and we find no persuasive reason for doing so here, particularly when the issue which has been presented for

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[6] Article XII, section 8 provides in this regard that:

> The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

the first time on appeal involves the constitutionality of a provision which has not yet been applied to MSM. *See Asbury Hospital,* 326 U.S. at 213-14; *Omaha National Bank,* 389 N.W.2d at 284. We note, however, that MSM purchased its farm land well after voters had adopted the corporate farming prohibition,[7] and that under such circumstances a court might be hard-pressed to find that MSM had not been "afforded a fair opportunity to realize the value of the land" if divestiture is subsequently ordered. *Asbury Hospital,* 326 U.S. at 212.

III. CONCLUSION

The people of Nebraska have made a reasonable judgment that prohibiting non-family corporation farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment. The equal protection clause is satisfied if the law adopted through the initiative process is rationally related to a legitimate state interest. The district court properly applied this test in evaluating the constitutionality of article XII, section 8 of the Nebraska Constitution, and its judgment upholding the law is hereby affirmed.

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[7] In fact, the law contains an exception for corporations which were engaged in farming or ranching operations on November 29, 1982, the effective date of the initiative. *See* Neb. Const. art. XII, § 8; *Omaha National Bank,* 389 N.W.2d at 283.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MSM FARMS, INC., a Nebraska Corporation,	)	CV88-L-229
Plaintiff,	)	
vs.	)	MEMORANDUM
ROBERT M. SPIRE, Attorney General for the State of Nebraska in his official capacity,	)	OF DECISION
Defendant.	)	FILED JAN 19 1990
and	)	
EVERETT HOLSTEIN and RICHARD BARTEK,	)	
Defendants-Intervenors.	)	

The plaintiff, MSM Farms, Inc., is a duly organized and existing Nebraska corporation. The defendant, Robert M. Spire, is the Attorney General for the State of Nebraska and is sued in his official capacity. The plaintiff seeks preliminary and permanent injunctive relief to restrain the defendant and his office from enforcing the provisions of Article XII, Section 8 (Sec. 8) of the Nebraska Constitution which restricts corporate ownership of real estate used for farming or ranching. Plaintiff also requests declaratory relief on the basis that Sec. 8 violates the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. This court has jurisdiction based upon 28 U.S.C. 1331 (federal question), 28 U.S.C. 2201 (declaratory judgment), and the Fourteenth Amendment. The defendant-intervenors are

two Nebraska farmers who wish to defend the constitutionality of Sec. 8.

FACTS

The plaintiff is a for-profit corporation first incorporated in 1987. There are 3,000 outstanding shares of stock, 1500 of which are owned by Paul Meyer, the president of the corporation, and 1500 that are owned by Gerald Schleich, the vice-president, secretary and treasurer of the corporation. The plaintiff is the record title owner of 10.11 acres of real estate located in Platte County, Nebraska, which it acquired on April 4, 1988. It also owns certain livestock purchased for breeding purposes. The aforementioned real estate was used for grazing during the 1988 grazing season, and MSM Farms intends to continue to graze its livestock upon the real estate. Neither of the two shareholders, nor either of their spouses, is related to the other shareholder or a spouse of the other shareholder within the fourth degree of kindred as required by Section 8. The plaintiff and the defendant have stipulated that the plaintiff is not and has not been since the date of its incorporation a family farm or ranch corporation within the meaning of subdivision (A) of Sec. 8, and have further stipulated that the plaintiff's ownership of the above described real estate is in violation of Sec. 8. Filing 12.

EQUAL PROTECTION

The plaintiff contends that Sec. 8 violates the equal protection clause of the Fourteenth Amendment because it impermissibly discriminates between corporations in

which the majority of voting stock is held by members of one family within the fourth degree of kindred and corporations which do not meet this requirement. I disagree and find no equal protection violation.

Although no precise formula has been developed, the Supreme Court has held that the Fourteenth Amendment allows the States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. *McGowan v. Maryland,* 366 U.S. 420, 425 (1961).

> The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (Emphasis supplied)

McGowan v. Maryland, supra at 425-426.

The actions of an electorate in exercising its initiatory powers should be presumed constitutional as if it were an action of the legislature. *Felix v. Milliken,* 463 F.Supp 1360, 1375 (E.D. Mich., 1978)

When a local economic regulation is challenged solely on equal protection grounds, the Supreme Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. *New Orleans v. Dukes,* 427 U.S. 297 (1976). Unless the classification infringes on a fundamental personal right or is drawn upon inherently suspect distinctions such as race, religion or alienage, the constitutionality of a statutory

discrimination is presumed and requires only that the classification challenged be rationally related to a legitimate state interest. *New Orleans v. Dukes, supra* at 303.

The plaintiff does not contend, and rightly so, that corporations are a suspect class or that corporate ownership of farm or ranch land is a fundamental personal right. The analysis must be whether the classification made in Sec. 8 between family and non-family corporations is rationally related to a legitimate state purpose. To determine if a challenged classification is rationally related to the achievement of a legitimate state interest, two questions must be answered: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for lawmakers to believe that use of the challenged classification would promote that purpose? *Western & Southern Life Ins. Co. v. Board of Equalization,* 451 U.S. 648 (1981) In the present case we are interpreting amendments to the Constitution and voters rather than legislation and lawmakers, but I believe the same questions need be answered.

(1) Existence of a legitimate purpose.

To review a state statute or constitutional provision under the equal protection clause a decision needs to be made as to whether the provision rationally furthers *any* legitimate state objective. It is constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *Malmed v. Thornburgh,* 621 F.2d 565, 569 (3rd Cir. 1980). Other courts have

addressed this issue when pertaining to initiative amendments. In *Felix v. Milliken,* 463 F.Supp. 1360 (E.D. Mich. S.D. 1978) plaintiffs challenged a constitutional amendment passed by the voters that raised the legal drinking age from age 19 to age 21 on equal protection grounds. The parties were in dispute as to the purpose on which the court should focus in determining whether a rational relationship existed. The plaintiffs argued that the court should look only to the purpose articulated by the proponents in the campaign to win passage. The State argued that the court was not bound to look only to the articulated purpose, but in the area of liquor regulations should also look to other rational bases that my be apparent from the classification. The court agreed with the State and held that it knew of "no case in which the Supreme Court has held that the Court can only look to the specified articulated purpose particularly when dealing with non-suspect classifications and other than fundamental rights." *Felix, supra* at 1377. Another court has held that election brochure arguments are properly considered as legislative history in construing the purpose of a constitutional amendment adopted by popular vote. *Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y,* 557 F. Supp. 1190 (E.D. Calif. 1983).

The petition for Initiative 300 stated that "The object of this initiative petition is to prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land, and to prohibit further establishment of non-family corporate crop and livestock operations." Filing 25. I can infer from this statement that by enacting Initiative 300 the voters sought to retain and promote family farm operations in Nebraska and sought to prevent a

perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farm land in the hands of non-family corporations. The Supreme Court has previously found that a state policy against the concentration of corporate-owned farming lands is a proper legislative objective. *Asbury Hospital v. Cass County,* 326 U.S. 207, 214 (1945). I find that the objective here is likewise a valid one.

(2) Does the classification promote the purpose?

The next question is whether it was reasonable for voters to believe that by enacting Initiative 300 they would be promoting family farm operations by preventing non-family corporate ownership of farm land. Statutory discrimination between different classes is presumed to be relevant to a permissible legislative purpose and will not be deemed a denial of equal protection if any state of facts can be conceived to support it. *Asbury Hospital, supra* at 215. The plaintiff is required to convince the court that the legislative purpose on which the amendment's classifications are based could not reasonably be conceived to be true by the governmental decision-maker, in this case the voters. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). Although the plaintiff may introduce evidence supporting a claim that there is no rational connection between the amendment and its objective, they cannot prevail so long as the question is at least debatable. If the question is at least debatable, a court cannot substitute its judgment for the voters on the wisdom and utility of the amendment. *Id.* at 464, 469.

The evidence presented to me does not indicate that a rational relationship cannot reasonably be conceived to exist between the prohibition against non-family corporate ownership of farm land and the preservation of the traditional family farm. Whether a rational relationship exists is at least debatable. I base this decision on the three documents that the plaintiff has provided: A 1982 Census of Agriculture (United States and Nebraska), a report to Congress entitled "Farm Organization and Performance in the 1970's," prepared by the Economic Research Service, U.S. Department of Agriculture, and a report by the Agricultural Research Division at the University of Nebraska-Lincoln entitled "Corporate Farming and Corporate Farming Restrictions in Nebraska." The Defendant-Intervenors have objected to portions of the UN-L document on the basis that they are irrelevant and contain hearsay. Filing 23. I will sustain the objections to the third and fourth paragraphs of page 51 and the first five paragraphs of page 52. As to pages 22 to 44, I conclude that the information contained therein is both hearsay and irrelevant to the issue of whether a rational relationship could conceivably been thought to exist between the amendment and the objective. As to the unobjected portions of the document, it provides no data to support the plaintiff's position. The only relevant information I can locate is the finding that less than one percent of Nebraska farms are owned by non-family corporations. This does not support plaintiff's assertion that family farming will not be benefited by excluding non-family corporate ownership of farm lands in the future. Likewise, a review of the Census Report and the Report to Congress states only that the number of non-family

corporations has not greatly changed in the eight years prior to 1982. (U.S. Census Report, p. 81, Nebraska Census Report, p. 4, Report to Congress, p. 16) I can find nothing which supports the plaintiff's position that no rational connection exists. That being the case, I find that the plaintiff's equal protection claim is without merit and that the amendment survives constitutional scrutiny under the equal protection clause.

Before moving on to the next issue I think I should address the plaintiff's reliance on *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) to support its contention that Sec. 8 improperly creates a classification based solely upon family relationships. It is true that the *Moreno* court held a provision of the Food Stamp Act to be in violation of the equal protection clause because it impermissibly distinguished between households whose members were related to one another as compared to households containing one or more members unrelated to the rest. The court based its decision on the fact that the classification had no rational relationship to the objectives sought to be furthered by the government, not because it is impermissible to create classifications based upon family relationships. In the present case a rational reason does exist for the differentiation and I find plaintiff's reliance on *Moreno* unpersuasive.

DUE PROCESS

The Plaintiff also claims that Sec. 8 is violative of the Due Process clause of the Fourteenth Amendment. The requirements of due process, in the absence of other

constitutional restriction, permit a state to adopt whatever economic policy may reasonably be deemed to promote public welfare and to promote that policy by legislation adapted to its purpose. If the law passed has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, the requirement of due process is satisfied. *Nebbia v. New York*, 291 U.S. 502 (1934). The Court has refused to sit as a superlegislature to weigh the wisdom of legislation and has refused to go back to the time when courts used the due process clause to strike down state laws which regulated business and industrial conditions because they may have been unwise or improvident. *Ferguson v. Skrupa*, 372 U.S. 726. I find that Sec. 8 does not violate the due process clause.

Dated January 19, 1990.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MSM FARMS, INC., a Nebraska Corporation, Plaintiff, vs. ROBERT M. SPIRE, Attorney General for the State of Nebraska in his official capacity, Defendant. and EVERETT HOLSTEIN and RICHARD BARTEK, Defendants-Intervenors.	)	CV88-L-229 JUDGMENT FILED JAN 19 1990

In accordance with today's memorandum of decision,

IT IS ORDERED that judgment is entered for the defendant.

Dated January ___, 1990.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

Supreme Court, U.S.
FILED
JUN 20 1991
OFFICE OF THE CLERK

(2)

No. 90-1816

In The

Supreme Court of the United States

October Term, 1990

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

DON STENBERG, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent restates the Questions Presented as follows:

I.

Did the courts below correctly hold that Article XII, Section 8, of the Nebraska Constitution does not deprive petitioner of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

II.

Did the courts below err as a matter of law in determining that Article XII, Section 8, of the Nebraska Constitution does not contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondent accepts the petitioner's designation of parties to the proceeding in the Petition, with the exception of noting that Don Stenberg has succeeded Robert M. Spire in the office of Attorney General of the State of Nebraska. Pursuant to Rule 35.3 of this Court, Attorney General Stenberg has thus been substituted as the respondent in this action.

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No. 90-1816

In The

Supreme Court of the United States

October Term, 1990

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

DON STENBERG, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 927 F.2d 330 (1991), is reprinted in the Appendix to the Petition. The opinion of the United States District Court for the District of Nebraska, dated January 19, 1990, which is unreported, is reprinted in the Appendix to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Article XII, Section 8, of the Nebraska Constitution. The text of pertinent portions of these constitutional provisions are reprinted in the Petition (Pet. Cert. 2-7).

STATEMENT OF THE CASE

Petitioner MSM Farms, Inc. [MSM], a Nebraska corporation, brought this action for declaratory and injunctive relief against the Attorney General of Nebraska. Petitioner sought preliminary and permanent injunctive relief to restrain the respondent and his office from enforcing the provisions of Article XII, Section 8 of the Nebraska Constitution, which prohibits non-family farm corporations from owning or operating Nebraska farm or ranch land. Petitioner also sought declaratory relief on the basis that Article XII, Section 8, violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The jurisdiction of the United States District Court for the District of Nebraska was invoked pursuant to 28 U.S.C. § 1331

(federal question), 28 U.S.C. § 2201 (declaratory judgment), and the Fourteenth Amendment (Pet. Cert. App. 12).

The district court, in a Memorandum of Decision dated January 19, 1990, held that Article XII, Section 8, did not violate the equal protection or due process clauses of the Fourteenth Amendment, and entered judgment for the Attorney General (Pet. Cert. App. 12-21). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court (Pet. Cert. App. 1-11). With respect to MSM's equal protection claim, the Eighth Circuit determined the district court applied the proper standard in finding the prohibition of non-family corporate farming in Article XII, Section 8, was rationally related to a legitimate state interest (Pet. Cert. App. 2-8). The Eighth Circuit declined to decide petitioner's due process claim, as the issue sought to be presented on appeal was not decided by the district court (Pet. Cert. App. 9-10). With regard to the due process issue sought to be raised by MSM, the Court of Appeals did note that MSM purchased its farm land after the adoption of the non-family corporate farming prohibition and stated that "under such circumstances a court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divestiture [were] subsequently ordered" (Pet. Cert. App. 10).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondent respectfully submits the Petition should be denied.

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

Petitioner makes two arguments as to why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Eighth Circuit. First, petitioner contends the prohibition in Article XII, Section 8, against non-family corporate ownership or operation of farm or ranch land, violates the equal protection guarantee embodied in the Fourteenth Amendment to the United States Constitution. Second, petitioner contends the Court of Appeals erroneously failed to consider its due process claim, and that Article XII, Section 8, provides for an unlawful deprivation of property without due process in contravention of the Fourteenth Amendment. Neither question presented by petitioner involves an issue so special or important as to justify granting the writ.

A. MSM's Equal Protection Claim Does Not Warrant Review.

With respect to MSM's equal protection claim, the courts have universally upheld state enactments regulating and restricting the ownership of agricultural lands by certain types of corporations against challenges brought

on equal protection grounds. The seminal case on this issue is *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945), in which this Court directly rejected an equal protection challenge to a state prohibition on corporate ownership of farm land. In *Asbury Hospital*, the Court considered a North Dakota corporate farming statute which provided that corporations holding land "used or usable for farming or agriculture" at the time of the statute's enactment were required to divest such lands within ten years, except for those lands "reasonably necessary in the conduct of their business." *Id.* at 209. The North Dakota statute contained exceptions from the divesture requirement for lands owned and held by corporations engaged in the business of dealing in farm lands and for lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders were farmers residing on farms or depending principally on farming for their livelihood. *Id.* at 214. In rejecting the hospital's contention that the exceptions for corporations in the business of dealing in farm lands and cooperative corporations resulted in a denial of equal protection, this Court stated:

> We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

Id.

In addition to the decisions rendered by the courts below, the highest courts of two states have relied on the

Court's opinion in *Asbury Hospital* to sustain the constitutionality of restrictions on corporate ownership and operation of agricultural lands. *Omaha Nat'l Bank v. Spire*, 223 Neb. 209, 230-32, 389 N.W.2d 269, 282-83 (1986) (upholding validity of Neb. Const. Art. XII, Section 8, on equal protection grounds); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805-06 (Mo. 1988) (upholding against equal protection challenge Missouri statute prohibiting corporations other than "authorized" or "family farm" corporations from engaging in farming or obtaining any interest in agricultural land). The definition of "family farm corporation" involved in *State ex rel. Webster v. Lehndorff Geneva, Inc.*, requiring that at least one-half of the stockholders be members of a family related to one another in a specified manner and that at least one person having an ownership interest be involved in exercising management control or direction, is very similar to the definition of "family farm or ranch corporation" in Article XII, Section 8. 744 S.W.2d at 805n.3. In upholding the constitutionality of the Missouri statutory scheme, the Missouri Supreme Court stated:

> The effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland. The legislature apparently believed that the superior financial and other business resources of these corporations would have a detrimental effect on traditional farming entities. This is because the cyclical

> nature of the farming industry periodically causes depressed markets and losses which large, diversified corporations are better able to sustain. Thus the traditional farming entities would operate at a competitive disadvantage.

Id. at 805.

Citing this Court's decision in *Asbury Hospital* and the Nebraska Supreme Court's decision in *Omaha Nat'l Bank v. Spire*, the Missouri Supreme Court concluded:

> It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.

744 S.W.2d at 806.

The Court of Appeals properly relied on these precedents in concluding that the policy underlying passage of the initiative amendment in Nebraska was rationally related to a legitimate state interest, recognizing that the constitutional provision "sought to retain and promote family farm operations in Nebraska and sought to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations." (Pet. Cert. App. 6).

The gist of petitioner's equal protection claim is that the exception for a "family farm or ranch corporation" is not rationally related to the purpose served by the constitutional provision. Petitioner's focus on the family relationship requirement, as if otherwise unrestricted, does

not accurately characterize the full impact and purpose of the amendment. MSM completely disregards the other component, equally as important to the concept of the family farm, that at least one family member must be "residing on or actively engaged in the day to day labor and management of the farm." Thus, like the North Dakota statute which this Court found constitutional in *Asbury Hospital*, Article XII, Section 8 fosters (and, in fact, mandates) contact and involvement with the farm operation – thereby discouraging the detrimental impact of corporate absenteeism.[1]

It is beyond dispute that the classification of a "family farm or ranch corporation" is rationally based and serves the legitimate state interest promoted by the constitutional provision. The classification recognizes that a farm or ranch family may wish to incorporate to limit liability, to provide for business continuity, or for estate planning reasons. Several states which otherwise restrict corporate involvement in agriculture specifically define family farm corporations as exceptions to the general prohibition. In addition to Nebraska, the states of Iowa, Kansas, Minnesota, Missouri, and South Dakota have established exceptions for family farm corporations

[1] The Court of Appeals specifically noted the rational basis for this requirement by commenting on how MSM embodies the problems endemic to corporate farming in that neither of its two incorporators lived in or near the farm land purchased by MSM, one had never even seen the land, and the other had limited knowledge of its location and characteristics (Pet. Cert. App. 7-8).

permitting these entities to engage in farming.[2] Like the Nebraska exception, these definitions typically require that the corporation's shareholders be related within specified degrees of consanguinity and that at least one stockholder either reside on the farm or be actively engaged in the management of the farm operation.[3] The purpose of the prohibition against non-family corporate ownership and operation of farm or ranch land in Article XII, Section 8, is to preserve an agriculture where families own and work the land. The Court of Appeals correctly held that this constitutes a legitimate state purpose, and that the exception for family farm or ranch corporations under the Nebraska constitutional provision is rationally related to the furtherance of this purpose. MSM's equal protection challenge to the provision is wholly without merit.

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[2] Iowa Code Ann. § 172C.1.8 (West 1990); Kan. Stat. Ann. § 17-5903(j) (1988); Minn. Stat. § 500.24(2)(c) (1990); Mo. Ann. Stat. § 350.010(5) (Vernon 1991); S.D. Codified Laws Ann. § 47-9A-14 (1983).

[3] For example, Mo. Ann. Stat. § 350.010(5) defines a family farm corporation, in part, as one

> . . . incorporated for the purpose of farming and the ownership of agricultural land in which at least one-half of the voting stock is held by and at least one-half of the stockholders are members of a family related to each other within the third degree of consanguinity or affinity including the spouses, sons-in-law and daughters-in-law of any such family members according to the rules of the common law, and at least one of whose stockholders is a person residing on or actively operating the farm, ...

In sum, MSM's equal protection claim presents no substantial or important question necessitating review by this Court. MSM has not demonstrated that any conflict exists among the circuit courts on the issue presented, nor has petitioner shown that any conflict between the decision of the Court of Appeals and any state court of last resort exists. Indeed, the only decisions rendered on this issue support the Eighth Circuit's holding that the restrictions in Article XII, Section 8, on non-family corporate ownership and operation of farm or ranch lands do not violate the equal protection clause. Accordingly, the Court should decline to grant review of MSM's equal protection claim.

B. MSM'S Due Process Claim Is Not Properly Before The Court.

MSM also requests the Court to consider its claim that Article XII, Section 8, violates the due process clause because it contains a provision requiring corporations unlawfully owning farm or ranch land to divest themselves of such land within two years after the state has obtained a court order requiring divestment. Petitioner now claims that the portion of Article XII, Section 8, providing that land may be escheated to the state if the corporation fails to divest land subject to a court order of this nature within this two year period, results in an unlawful deprivation of property without due process. (Pet. Cert. 18-20). The Court should decline consideration of this question for several reasons.

"Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller,*

425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147n.2 (1970). It is apparent in this case that MSM did not present this question to the district court, and that, accordingly, the Court of Appeals declined to decide this due process issue on appeal. (Pet. Cert. App. 9-10). It is true the Eighth Circuit did note that MSM purchased its farmland after the adoption of the non-family corporate farming prohibition and stated "that under such circumstances a court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divesture [were] subsequently ordered." (Pet. Cert. App. 10). Neither the district court nor the Court of Appeals, however, decided the question which MSM now requests this Court to review. Under the Court's long-standing policy of declining to consider questions not raised in or decided by the lower courts, MSM's request for review of this issue should be denied.

Furthermore, a serious question exists as to whether MSM's due process claim presents a justiciable case or controversy. Relief under the Declaratory Judgment Act is available only when an "actual controversy" is presented. 28 U.S.C. § 2201. In addition, federal courts are constitutionally limited to deciding "cases or controversies." U.S. Const. art. III, § 2, cl. 1. While there is no question that respondent may bring an action to obtain an order directing MSM to divest its farmland for violation of the amendment, it is completely hypothetical as to whether or not MSM would be able to divest itself of the land over the two year period provided under the amendment for a fair return if such an order were obtained.

Under the circumstances present in this case, it would be inappropriate for the Court to address whether

the provision for escheatment of land not divested within two years of the issuance of a court order pursuant to Article XII, Section 8, could violate the guarantee of due process, as it is clear this provision has not been applied to MSM. Indeed, it is purely speculative as to whether it may ever be applied to MSM, as no actual controversy would exist unless and until MSM were subject to an order of divestment, and was unable to divest itself of the land within the two year period provided under the amendment. Respondent submits it would be improvident to grant a writ of certiorari to review the due process claim sought to be presented by MSM on this record.

Finally, it is evident that various decisions of this Court support the constitutionality of the divestiture procedure contained in Article XII, Section 8, against an attack on due process grounds. In upholding the validity of the North Dakota divestiture provision at issue in *Asbury Hospital* against a due process challenge, the Court stated:

> The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale.

Asbury Hospital, 326 U.S. at 212-13.

As the Eighth Circuit noted, "MSM purchased its farm land well after voters had adopted the corporate farming prohibition, and that under such circumstances a

court might be hard-pressed to find that MSM had not been 'afforded a fair opportunity to realize the value of the land' if divestiture [were] subsequently ordered." (Pet. Cert. App. 10) (*citing Asbury Hospital*, 326 U.S. at 212) (footnote omitted). The two year divestment period provided under Article XII, Section 8, is a reasonable time to permit a corporate violator to find a willing buyer, particularly since the corporation would know or should know of the law's requirements. *See also State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d at 808 (upholding against due process challenge two year divestment period under Missouri statute banning non-family corporate ownership or operation of agricultural land).

In addition, the Court has upheld the power of a state to permit or even require interests in property to revert to another after the passage of time, *Texaco, Inc. v. Short*, 454 U.S. 516, 527-28 (1982), and has affirmed the power of a legislative body to impose an affirmative duty on the *legal* owner of a property interest and, upon failure to comply with newly imposed requirements (with adequate notice), the authority of such body to extinguish those property rights without compensation. *United States v. Locke*, 471 U.S. 84, 104-110 (1985). Any property loss through escheatment which *may* result to a corporation violating Article XII, Section 8, would be due first to the corporation's unlawful acquisition or engagement in the prohibited activity, and second, to its neglect to dispose of the property within the two year period provided after divestment is ordered by a court. The amendment clearly provides a corporation violating its prohibitions with adequate due process protections.

CONCLUSION

As the Court of Appeals stated in its opinion, "[t]he people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land." (Pet. Cert. App. 10). While the provisions of Article XII, Section 8, of the Nebraska Constitution, represent an important public policy determination made by the people of Nebraska, the constitutional attacks raised by MSM do not present any substantial or important questions necessitating review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

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No. 90-1816

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

ROBERT M. SPIRE, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF INTERVENORS IN OPPOSITION

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QUESTIONS PRESENTED

Intervenors would restate the questions presented for review as follows:

I. Did the United States District Court for the District of Nebraska and the United States Court of Appeals err as a matter of law in determining that Article XII, Section 8 of the Nebraska Constitution does not deprive Plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

II. Did the United States District Court for the District of Nebraska and the United States Court of Appeals err as a matter of law in determining that Article XII, Section 8 of the Nebraska Constitution does not contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Intervenors accept the Petitioner's designation of Parties to the Proceeding in this Petition except would note to the Court that Don Stenberg has succeeded Robert M. Spire in the Office of Attorney General of the State of Nebraska.

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No. 90-1816

In The

Supreme Court of the United States

October Term, 1991

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

ROBERT M. SPIRE, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, dated February 27, 1991, is reported at 927 F.2d 330 (8th Cir. 1991) and the Opinion of the United States District Court for the District of Nebraska, dated January 19, 1990, is unreported. Both Opinions are reprinted in the Appendix to the Petition.

JURISDICTION

The jurisdictional grounds are properly stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Article XII, Section 8 of the Nebraska Constitution. These constitutional provisions are reprinted in the Petition (see Petition for Certiorari, pp. 2-7).

STATEMENT OF THE CASE

Petitioner MSM Farms, Inc. (hereinafter "MSM"), a Nebraska corporation, commenced an action in the United States District Court for the District of Nebraska seeking declaratory injunctive relief against the Attorney General of the State of Nebraska with respect to the enforcement of the provisions of Article XII, Section 8 of the Nebraska Constitution. Article XII, Section 8 of the Nebraska Constitution prohibits non-family farm corporations from owning or operating Nebraska farm or ranch land and only permits family farm corporations to own or operate Nebraska farm or ranch land if the family farm corporation meets the definition under the constitutional provisions. That definition includes two standards, i.e., kinship of the owners and the requirement that one of the family members is "a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch". Petitioner sought the declaratory injunctive relief on the basis that the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution were violated by the provisions of Article XII, Section 8. Jurisdiction of the United

States District Court for the District of Nebraska was invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201, and the Fourteenth Amendment.

The District Court, by Order dated February 16, 1989, permitted two farmers, i.e., Everett Holstein and Richard Bartek, to intervene as defendants. The District Court then proceeded to try this matter on a record submitted by the parties and, in a Memorandum Decision dated January 19, 1990, the District Court entered judgment for the Defendants and against the Plaintiff holding that Article XII, Section 8 did not violate either the equal protection clause or the due process clause of the Fourteenth Amendment. MSM appealed and the United States Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the District Court. MSM has now filed a Petition for Certiorari before this Court.

REASONS FOR DENYING PETITION

The Petition does not present any grounds, nor could it, for granting a Petition for Certiorari. Pursuant to Rule 10 of the Rules of this Court, a petition should be granted only when there are "special and important reasons therefor". The Petitioner has cited none and there is no decision in conflict with another United States Court of Appeals decision nor has a state court of last resort decided any issues herein differently (and, in fact, the Nebraska Supreme Court has agreed with the decisions rendered by the two courts below herein, *see Omaha National Bank v. Spire*, 223 Neb. 209 (Neb. 1986)) and the decisions of the courts below do not conflict with any

decisions of this Court and, in fact, follow closely the line of decisions of this Court. For these reasons, the Petition filed herein should be denied.

I. THE PETITIONER HAS FAILED TO NOTE ANY SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT.

The Petitioner makes no attempt to argue what Rule 10 recognizes as the fundamental character of reasons the Court will consider in granting the Petition for Cert. There are basically no contrary court decisions which the Petitioner could cite. Furthermore, the lower courts' dispositions of both the equal protection and due process clause are totally consistent with decisions of this Court and decisions of other circuits and state courts.

A. MSM's Claims Do Not Warrant Review.

Petitioner cites no conflict in the courts on either the equal protection issue or on the due process issue – and there is none. The courts have consistently upheld state regulation of ownership of land. Indeed, regulating the ownership of land in this country is as old as the American Revolution. This Court, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) noted:

> After the American Revolution, the colonists in several states took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the colonies. See, e.g., Act of May 1779, 10 Henning's Statutes at Large 64, ch. 13, Para. 6 (1882) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa Acts 258, ch 139

> (1782) (Pennsylvania statute.) *Courts have never doubted that such statutes served a public purpose.* See, e.g., *Wilson v. Iseminger*, 185 U.S. 54, 60-61, 46 L.Ed. 804, 22 S.Ct. 573 (1902); *Stewart v. Garter*, 70 Md. 242, 243, 16 A 644, 645 (Md. 1889).

Id. at 241, n.5 (emphasis supplied)

A century ago, Nebraska became the second state to prohibit aliens and non-domestic corporations from owning interests in Nebraska land and from leasing Nebraska land for periods in excess of five years. 76-402, et seq., Neb. R.R.S. 1943. The 1889 laws, together with embellishments, remain in effect today. Two years later and for a period of 70 years, Nebraska authorized real estate corporations to issue bonds for the purchase of land only if such corporations had twenty or fewer shareholders and then only if each shareholder, in his or her own right, owned at least 40 acres of land in the county of incorporation. 21-501 – 21-504 Neb. R.R.S. 1943.

North Dakota was the first state to enact legislation regulating corporate involvement in farming – and did so as early as 1933.

From 1971 through 1975, Oklahoma, Kansas, Wisconsin, South Dakota, Iowa, Minnesota, and Missouri passed legislation that prohibited corporate ownership of farmland and oftentimes corporate operation of agricultural activities, but generally provided exceptions for the 'family-farm corporation' in which some control was held by related shareholders, with some statutes providing that one or more of whom must live on and/or alternatively operate the farm. Some of these legislative measures provide exceptions to closely-held corporations, similar to

sub-chapter S corporations, where a majority of the activities of the corporation are limited to farming. 1971, Oklahoma, Okla. Stat. Ann. Title 18, 951 *et seq.*; 1975, Minnesota, Minn. Stat. 550.24; 1975, Missouri, Mo.Rev. Stat. 350.010 *et seq.*

This Court, in *Asbury Hospital v. Cass*, 326 U.S. 207 (1945) specifically upheld the North Dakota Supreme Court's ruling that North Dakota's statute which prohibited certain corporate ownership of farm land and required corporations (both domestic and foreign) who owned or held rural real estate to "dispose of the same within 10 years . . . " *Id.* at 209. In approving this state classification scheme and the requisite corporate divestment of farm land, this Court stated:

> We cannot say there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a *state policy* against the concentration of farming lands *and* corporate ownership.

Id. at 214. (Emphasis supplied)[1]

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[1] Curiously, MSM, in its Petition, makes no reference to *Asbury Hospital v. Cass* although it was one of several cases relied upon by the Eighth Circuit and the District Court. This omission is probably not inadvertent since it is extremely difficult to distinguish the basic holdings of the two cases. The North Dakota statute restricted all corporations except "cooperative corporations" which were defined in North Dakota statutes as corporations "75% of whose members or stockholders are actual farmers or residing on farms or depending principally on farming or agriculture for their livelihood . . . ". *Asbury Hospital v. Cass County*, 7 N.W.2d 438, 456 (N.D. 1943).

Likewise, as previously noted, the Nebraska Supreme Court specifically upheld Initiative 300's constitutionality in response to an attack based on both the equal protection clause and the due process clause. *Omaha National Bank v. Spire*, 223 Neb. 209 (Neb. 1986). In doing so, the Court specifically relied on the United States Supreme Court's decision in *Asbury Hospital v. Cass, supra*, and specifically cited the quote therefrom which is set forth above. MSM ignores the consistency of the lower court's decisions with these compelling precedents. Finally, and more recently, the Missouri Supreme Court has upheld the constitutionality of the Missouri statute which prohibited a corporation, other than a family farm corporation, from engaging in farming and from obtaining an interest in agricultural land. *State ex rel Webster v. Lehndorff Geneva*, 744 S.W.2d 801 (Mo. 1988). A family farm corporation was defined in a significantly similar manner as it is defined in Initiative 300 including a specification of the degree of familial affinity and the requirement that at least one of the stockholders reside on or actively operate the farm. *Id.* at 805, n.3. In upholding the constitutionality of the Missouri scheme, the Missouri Supreme Court specifically held that the statute was rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional farming entities. *Id.* at 806.

In so holding, the Court made the very analysis applicable to Initiative 300:

> The effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment

> of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland.

Id. at 805.

B. The Equal Protection Issue.

The Petition for Certiorari is, at best, muddled and hard to follow. Requisite arguments to support a Petition for Certiorari are omitted and the argument that is presented is confused, political in nature, and contrary to clear precedent.

Regardless of the Petition's confusion, the Petitioner appears to argue that the Court of Appeals erroneously determined that Initiative 300 serves a legitimate state interest. However, Petitioner never specifically identifies the interest found by both courts below to have been a legitimate state interest and never then discusses why it is not a legitimate state interest. It is this very important step in the equal protection analysis that Petitioner overlooks and which then fundamentally flaws all of Petitioner's analysis.

It is likely Petitioner overlooks this issue because, as noted by both courts below, the legitimate state purpose served by Initiative 300 is so clearly the kind of state interest recognized under equal protection analysis principles. All of the legal precedent supports the purposes of Initiative 300. (See, for example, App. 6.) The conclusion of the courts below was that the purpose of Initiative 300 was to

> retain and promote family farm operations in Nebraska and . . . prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farmland by preventing the concentration of farmland in the hands of non-family corporations.

See App. 6. Although *Asbury Hospital v. Cass, supra,* clearly stands for the proposition that the prevention of the concentration of ownership of farmland in corporations is a legitimate state purpose, Petitioner makes no effort to either distinguish *Asbury Hospital* from the case at hand (probably because Petitioner cannot make any such distinction) nor does Petitioner make any argument why this Court should not follow its own precedent.

In its attack on Initiative 300, Petitioner makes several arguments that it simply failed to adduce evidence on and which therefore are not based on any evidence before this Court. For example, Petitioner argues that the cost of ownership of ranch and farmland results in Initiative 300 creating a system "in which only select and privileged families are allowed the protection of certain Nebraska laws". (Pet. Cert. 12). Petitioner can cite to no evidence in the record to support this assertion – there is none.

Petitioner is schizophrenic on what Initiative 300 does or does not do. On the one hand, Petitioner argues that "every single individual in Nebraska or the United States for that matter, are impacted by Article 12, section 8." (Pet. Cert. 8). On the other hand, Petitioner argues that Initiative 300 creates "a class of select persons who may participate in the ownership of land." (Pet. Cert. 16). Petitioner cannot have it both ways. Indeed, Petitioner is right in the first instance, i.e., Initiative 300 impacts on all

persons in the State of Nebraska. Thus, there is no equal protection violation. On the other hand, making distinctions between certain corporate ownership, as previously noted, has long withstood equal protection scrutiny.

Petitioner drops the names of two major corporations, i.e., Tyson Foods and Cargill, as legal family-owned corporations under Initiative 300. Petitioner then considers ridiculous, absurd or unconstitutional the favoring of Tyson Foods and Cargill over a little corporation made up of two individuals as involved herein. This argument clearly demonstrates the grasping at straws in which Petitioner engages in its Petition. Firstly, there is simply no evidence in this record as to the corporate make-up or ownership of either Tyson Foods or Cargill. This Court is in no position to take it on faith that they are family-owned corporations within the meaning of Initiative 300. Secondly, and more importantly, even if Tyson Foods and Cargill have a majority of stock held in one family, they would not qualify as a family farm under Initiative 300 unless one of the family members resided on the farm or was actively engaged in the day-to-day labor and management of the farm. As the lower courts noted, MSM, even if owned by family members, would, just like Tyson and Cargill, not qualify given the lack of involvement of the owners in the day-to-day operation of the farm.

Petitioner's argument also seems to imply that the only way one could enter farming is by incorporating. However, this is belied by the very data submitted by Petitioner which shows most farms don't involve incorporation. Initiative 300 merely provides that if individuals or persons decide to use the *corporate* structure then, and only then, must there be both a certain amount of

family ownership of the corporate structure and active involvement (either residence or day-to-day labor and management) of a family member in the farm operation.

Unbelievably, Petitioner proceeds to trivialize the familial relationship requirement as a requirement that individuals have nothing more than an "accident of birth" as if there is something inherently wrong with encouraging the family and family relationships. There clearly is not anything wrong with such an encouragement and this Court has determined that a state has a legitimate interest in protecting family life and values. See, for example, *Village of Belle Terre v. Borraas*, 416 U.S. 1 (1974).

In the end, there can be no question that legitimate governmental purposes can be served by treating corporations differently based on the nature of the ownership of the corporation and on whether the ownership is familial or non-familial and on whether the controlling owners are intimately involved in the operation of the farm. In fact, such differential treatment can be found in the federal tax treatment of corporations. See, for example, Sections 447 and 448 of the Internal Revenue Code.[2] The reasons for differing treatment are undoubtedly numerous. The point is they exist generally and have been so recognized. The reasons for differing treatment in the agricultural sector are no less and probably more and are just as reasonable.

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[2] The family corporation includes definitions as to degree of kinship and percentage of ownership of the stock just as does Initiative 300. See 447(d)(3).

Likewise, the Social Security Act, to the extent it requires payment of a tax to ensure retirement and disability income is a form of economic regulation which focuses the benefits of its programs, in substantial part, on members of the family. See, for example, 42 U.S.C. 402(b)(c)(d). This fostering of the family relationship and family values is clearly a legitimate purpose.

Initiative 300's focus on both the family distinction and involvement in the farm operation is a focus which finds support in express national policy encouraging preservation of the family farm and conditioning eligibility for benefits on becoming

> owner operators of not larger than family farms (or in the case of cooperatives, corporations, partnerships and joint operations in which a majority interest is held by individuals who are related by blood or marriage as defined by the Secretary, such individuals must be or will become either owners or operators of not larger than a family farm and at least one such individual must be or will become an operator of not larger than a family farm.)

7 U.S.C. Section 1922(3).

Petitioner also attacks the well-established judicial standard, followed by the lower courts, that there be a rational relationship between the legitimate state interest and the means of accomplishing that interest. In doing so, the Petitioner reveals the quintessentially political character of its own arguments. It asks this Court to superimpose on the people of Nebraska this Court's political judgment about the probabilities of success of an enacted measure. In doing so, the Petitioner articulates a new, and

heretofore never before expressed, standard for determining a rational relationship as being one in which "the means stands a better than average chance of accomplishing the task without creating separate privileged classes of people without good cause". (Pet. Cert., p.17) Firstly, Petitioner does not, nor could it, cite authority for this proposition. Secondly, what kind of Pandora's Box does this open for litigating equal protection claims? How would one determine, beforehand, that a legislative action or the acts of citizens have a "better than average" chance of solving the problem? What would an average chance be, i.e., a 50/50 chance? Petitioner's argument advances a theory that boils down to a constitutional crapshoot – or constitutional keno. Furthermore, what would constitute good cause for creating separate privileged classes of people? What Petitioner is really asking this Court to do and has already asked the lower courts to do, is to abandon precedent and become a "super legislature". This is exactly what this Court has said it will refuse to do. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). The lower courts wisely avoided the abandonment of longstanding precedent and the absurd legal trap presented by the Petitioners. As so well-stated by the Court of Appeals:

> MSM misapprehends the nature of our inquiry under the equal protection clause. It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. See *Clover Leaf Creamery*, 449 U.S. at 469. Whether *in fact* the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have

> decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land. *Id.* at 466; *Hawaii Housing Authority*, 467 U.S. at 242. See *Kadrmas*, 487 U.S. at 463.

(At App. 6-7).

C. The Due Process Claim.

The Circuit Court correctly rejected the Petitioner's belated "new" due process argument which clearly constituted an argument not raised and decided by the District Court. However, it went on to properly state that, under the circumstances of this case, the Court might be hard pressed to find a due process violation even if it had been properly raised.

The focus of MSM's belated and "new" argument is that required divestitute of land within two years after a court order requiring divestitute does not ensure the provision of just compensation and, therefore, violates the due process clause of the Fourteenth Amendment.

This argument belies the facts of this case.[3] Initiative 300 has a "grandfather" clause which allows for those corporations which are non-family farm corporations who, at the time of the passage of the initiative, engaged in acts which the initiative made unlawful – and, therefore, allowed them to retain their ownership interest. What Initiative 300 prohibits is future acquisitions by

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[3] Intervenors further join in, without repeating herein, the additional legal analysis provided by Respondent's Brief in Opposition. In short, Petitioner's argument is totally without merit.

unqualified non-family farm corporations. This "notice", prior to acquisition, surely undercuts any claim that a law violator might later have regarding a requirement that it divest itself of land or a farm operation which it knowingly obtained unlawfully. Petitioner's due process argument, while very short, seems to imply some kind of preemption argument that a state has no business regulating agricultural policy. Once again, Petitioner cites no authority for this position – because none exists. Furthermore, Initiative 300 represents as much land policy as farm policy – an area clearly within the State's police power to regulate.

CONCLUSION

Petitioner has presented this Court with absolutely no basis upon which to grant a Petition for Certiorari. The Petitioner's arguments are presented in the language and nature of political arguments. They are arguments rejected by the people of the State of Nebraska in the political arena. Petitioner does not present to this Court any legal justification for this Court to abandon its long-standing and recently affirmed precedent. There is no basis, legally or factually, for this Court to invade the right of a state and its people, to regulate corporate

involvement in farming. The Petition for Certiorari should be denied forthwith.

DATED THIS 9th day of July, 1991.

EVERETT HOLSTEIN AND
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